IN THE

Supreme Court of the United States

October Term, 1979
No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

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TABLE OF AUTHORITIES CITED

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The United States, in its opposing brief in Nos. 79-67 and 79-148, has rewritten the trial transcript and misstated petitioner's issues to an extent beyond the scope of this reply. For the sake of clarification this limited response follows:

1. Respondent's brief in opposition suggests repeatedly that L'Eggs Products employees "viewed" or "examined" one of the 8-mm films prior to relinquishing them to the FBI (Br. in Opp. 6-8). The implication is that a film was either screened on a projector or held up to the light so the contents of some of its individual frames could be ascertained. In fact, no film was ever placed on a projector and the attempts by both the L'Eggs Products employees and the FBI agent to "eye view" the film failed because the film

frames were too small to be seen with the naked eye (see R.T. Vol. 1 Supp. at 65-119, 137, 155 and Vol. 7 at C-133 to C-137).[1] Accordingly, the nature and content of the subject films were unknown until they were screened approximately two months after the FBI appropriated them.

2. The conflict in the circuits over whether the government's acceptance of First Amendment materials uncovered by a common carrier during a private search constitutes a "seizure" requiring a warrant has already spawned a law review article on the subject. *Note, Private Searches and Seizures, United States v. Kelly and United States v. Sherwin,* 90 Harv. L. Rev. 463 (1976). Conceding this conflict, respondent somehow believes this case is factually distinguishable from *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976), since L'Eggs Products employees "inspected" the contents of the film boxes. As was pointed out *supra,* however, this inspection yielded no information regarding the content of the films which were too small to be viewed with the naked eye. Any distinction between the two cases is therefore illusory.

Respondent likewise attempts to distinguish the "secondary search" problem announced in *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977), by contending that only the FBI viewed the films in *Haes* but in the present case "a L'Eggs Products employee had

[1]8-mm film is eight (8) millimeters in width. Excluding three (3) millimeters for sprocketing and one (1) millimeter for the border, the film is contained within a four (4) millimeter frame. This frame is less than 0.16 inch wide and the scenes depicted within the frame are necessarily much more minute. It is therefore understandable that such films cannot be examined with the naked eye.

examined the films and had ascertained their apparently obscene nature (Br. in Opp. 7)." In fact, the L'Eggs Products employees testified they did not know what was on the films. Also, it is irrelevant what these employees thought was obscene for to hold otherwise would authorize any third party to seize films, books and magazines. *A fortiori,* "[t]he two-month hiatus between the private search and the governmental screening negates any assumption that one continuous search took place. . . . If the descriptions on the box covers are an infallible guide to the contents of the films there would have been no need to retain the films for two months before making them available to the United States Attorney's office (Pet. App. 34-35 (Wisdom, J., dissenting))."

It is further suggested by respondent that *United States v. Chadwick,* 433 U.S. 1, has no applicability because the footlocker in *Chadwick* "gave no surface indication of its contents (Br. in Opp. 7 n. 7)." If probable cause to search an already seized container exists, however, a judicial warrant must first be obtained irrespective of "surface indications" of the container (Pet. App. 35-36 (Wisdom J., dissenting)). This is especially true of search warrants involving presumptively protected First Amendment films which must be "accorded the most scrupulous exactitude." *Stanford v. Texas,* 379 U.S. 476, 485.

3. Although several lower courts have determined that the proper remedy for an unlawful prior restraint is return of the property, not suppression of evidence, all of those cases involved material taken under the authority of a warrant and held for but a brief period. No court has ever decided whether suppression is a proper remedy when First Amendment materials are

appropriated without benefit of a warrant and held for a lengthy period of time. Suppression would appear to be a constitutionally mandated remedy under such circumstances.

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.